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June 4, 2004

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand Delivery

Marlene H. Dortch
Secretary
Federal Communications Commission
c/o 236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

Re: Amendment of Section 73.202(b),
Table of Allotments, FM Broadcast Stations
(Alva, Mooreland, Tishomingo, Tuttle,
and Woodward, Oklahoma)
MM Docket No. 98-155; RM-9082; RM-9133

Dear Ms. Dortch:

On behalf of Chisholm Trail Broadcasting Co., Inc. ("Chisholm Trail"), submitted herewith are an original and one copy of this notice regarding a permitted presentation in the above-referenced proceeding. On June 3, 2004, representatives of Chisholm Trail and Ralph Tyler met with Commissioner Kathleen Abernathy's office to address certain matters pertaining to the above-referenced FM allotment proceeding. The discussion focused on Chisholm Trail's position as summarized in the attached outline. The "consent decree" referenced in that outline refers to a Consent Decree dated August 11, 2003, which is an attachment to an Enforcement Bureau Order, DA 03-2598 (released August 12, 2003).

Chisholm Trail also made reference to the enclosed *Memorandum Opinion and Order*, FCC 04-116 (released May 26, 2004), in which the full Commission dismissed a petition for reconsideration filed by a former FCC licensee who had filed an allotment proposal seeking to upgrade the class of its FM station. In that case, the Commission affirmed its earlier decision dismissing the licensee's reconsideration petitions because the license for the station (as well as others controlled by the same licensee or its principal shareholder, Michael Rice), had been revoked due to a lack of character qualifications.

Lee Shubert attended the meeting on behalf of Ralph Tyler. Mark Lipp and the undersigned attended the meeting on behalf of Chisholm Trail. Stacy Robinson Fuller attended the meeting on behalf of Commissioner Kathleen Abernathy's office.

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Should any questions arise concerning this matter, please communicate directly with the undersigned.

Very truly yours,

DICKSTEIN SHAPIRO MORIN
& OSHINSKY LLP

Attorneys for
Chisholm Trail Broadcasting Co., Inc.

By: 
Andrew S. Kersting

Enclosure

cc: Stacy Robinson Fuller, Esq. (w/ encl.) *via hand*
Peter Doyle, Esq. (w/ encl.) *via hand*
Bryan Billings, Esq. (w/ encl.) *via first-class mail*
Lee Shubert, Esq. (w/ encl.) *via first-class mail*
Mark Lipp, Esq. (w/ encl.) *via first-class mail*

TISHOMINGO/TUTTLE RULEMAKING PROCEEDING

Legal Overview

- As a result of the August 2003 consent decree entered into between the Enforcement Bureau and Mr. Tyler, which resulted, *inter alia*, in the cancellation of the KTSH license and the withdrawal of all applications and pleadings relating to KTSH, including those pleadings filed by Mr. Tyler in this proceeding, there no longer is an expression of interest in the allotment of Channel 259C3 at Tuttle, Oklahoma.
- The Commission's authority to allocate broadcast spectrum is governed by Section 307(b) of the Communications Act which provides as follows:

In considering applications for licenses, and modifications and renewals thereof, *when and insofar as there is demand for the same*, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

47 U.S.C. §307(b) (emphasis added).

- Section 307(b) of the Act and the judicial interpretation of that statutory provision make clear that the Commission's discretion to allocate broadcast frequencies is limited to the extent that there is a demand for service.
- Consistent with that congressional directive, the Commission's longstanding policy in allotment rulemaking proceedings has consistently been to refrain from allotting a new channel absent an "expression of interest."
- The Commission should adhere to its statutory mandate and preserve the integrity of its longstanding policy in allotment proceedings by rescinding the reallocation of Channel 259C3 from Tishomingo to Tuttle.

Public Interest Benefits

- Due to the prolonged delay in holding FM Auction No. 37 and the significant backlog of vacant allotments that currently are available for auction, it is likely to be at least 3-4 years if not longer before a new allotment at Tuttle could be made available for auction.
- Rescinding the allotment at Tuttle and permitting Chisholm Trail to submit its own similar allotment proposal would create an opportunity for the Commission to provide a new radio

service to the residents of Tuttle or another nearby community that might better serve the objectives of Section 307(b) of the Act at a much earlier date and avoid the need for an auction.

- Chisholm Trail's allotment proposal would be subject to competing allotment proposals. In the event it were to be defeated by a competing counterproposal, it would necessarily mean that a third party had presented the Commission with a proposal that would *better serve the public interest* (and thereby the objectives of Section 307(b) of the Act) than the current allotment at Tuttle.
- The allotment at Tuttle, which would remain vacant for many years, is currently precluding other licensees from upgrading their stations and thereby enhancing service to their respective communities.

Equitable Considerations

- Chisholm Trail has expended considerable resources litigating this case before the Commission over the past 5½ years and was solely responsible for bringing the facts to the Commission's attention which ultimately resulted in the August 2003 consent decree.
- Had it not been for Chisholm Trail's efforts to pursue Mr. Tyler's wrongful conduct in this proceeding which resulted in him being disqualified from being a Commission licensee, the Commission would have adopted Tyler's allotment proposal and authorized KTSH to operate at Tuttle without any idea that his allotment proposal was based entirely upon a series of misrepresentations to the Commission.
- In light of the disqualifying misconduct which formed the basis of Mr. Tyler's allotment proposal, the Commission should treat this proceeding to change the station's community of license in the same manner that it would if a licensee had a major change application for an AM station pending at the time it was disqualified, in which case the Commission would simply dismiss the application. The same result should ensue here. The rulemaking proposal should be dismissed and the channel should be put back in Tishomingo where it was prior to the commencement of this proceeding.

Conclusion

In light of the consent decree, the station that was the subject of this proceeding no longer exists and the pleadings that Mr. Tyler filed in support of his proposal have all been withdrawn. Chisholm Trail respectfully submits that, consistent with the congressional directive set forth in Section 307(b) of the Act, the Commission should rescind the allotment of Channel 259C3 at Tuttle and allot the channel back to Tishomingo. This would provide Chisholm Trail with an opportunity to present an allotment proposal that will better serve the public interest than an allotment which will remain vacant and preclude enhanced service by other stations for many years to come.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of)
)
Amendment of Section 73.202(b),)
Table of Allotments,) MM Docket No. 89-120
FM Broadcast Stations.)
(Northweye, Cuba, Waynesville,)
Lake Ozark, and Eldon, Missouri))
)
)

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 2004

Released: May 26, 2004

By the Commission:

1. The Commission has before it a petition for reconsideration of its prior order in this proceeding,¹ filed by Lake Broadcasting, Inc. ("Lake"), the former licensee, *inter alia*, of Station KBMX(FM), Channel 270A, Eldon, Missouri. No oppositions or replies were filed.

2. Lake's request to upgrade the class of Station KBMX(FM) was previously denied in this proceeding.² Thereafter, two petitions for reconsideration of this action were dismissed as moot, and an application for review was denied because the license for Station KBMX(FM), Eldon, Missouri, as well as the other stations licensed to Lake or controlled by its principal shareholder, Michael Rice, had been revoked due to a lack of character qualifications, and the revocations had become final.³

3. Lake's latest petition for reconsideration, which was filed in May, 2002, argues that the Commission erred in dismissing its Eldon upgrade proposal as moot. The petition relies upon two court appeals of the Commission's denial of Lake's request for equitable relief to reopen the revocation proceeding⁴, contending that, until these cases are decided, it is premature to dismiss the reconsideration petition in this proceeding as moot. Lake requests that its petition for reconsideration in MM Docket 89-120 be held in abeyance pending the outcome of judicial review. However, in March, 2003, the United States Court of Appeals for the D.C. Circuit denied these appeals, affirming the Commission's determination that no relevant information not previously available and no evidence of fraud or misconduct had been presented that would warrant reopening a final proceeding.⁵ In view of this decision, Lake's latest petition for reconsideration may be dismissed as moot.

¹ *Northweye, Cuba, Waynesville, Lake Ozark, and Eldon, Missouri*, 17 FCC Rcd 7585 (2002) ("MO&O").

² *Northweye, Cuba, Waynesville, Lake Ozark, and Eldon, Missouri*, 7 FCC Rcd 1449 (MMB 1992).

³ *Northweye, Cuba, Waynesville, Lake Ozark, and Eldon, Missouri*, 16 FCC Rcd 7982 (MMB 2001), *recon. dismissed*, 16 FCC Rcd 19423 (MMB 2001), *app. for rev. denied*, 17 FCC Rcd 7585 (2002). *See also Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 920 (2001) (Mem).

⁴ *See Michael S. Rice*, 17 FCC Rcd 7111 (2002).

⁵ *Rice v. FCC*, 60 Fed.Appx. 332 (D.C. Cir. 2003).

4. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Lake Broadcasting, Inc., IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary